

## **SYMPOSIUM ARTICLE: DIGITAL TOOLS AND COPYRIGHT CLAY: RESTORING THE ARTIST/AUDIENCE SYMBIOSIS**

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### **Reporter**

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(c)Lateef ***Mtima***, Professor of Law, Howard University School of Law, Director, Institute for Intellectual Property and Social Justice. I would like to thank the participants in the Whittier Law Review Symposium Emerging Dilemmas in Entertainment Law: Resolving Technology's New Ethical Concerns for their insights and also Professor Tuneen Chisolm for her thoughtful comments. I would also like to thank Willmary Escoto (HUSL 20'18) for her excellent research assistance and the Howard University School of Law for research support.

## **Text**

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### **[\*104] I. INTRODUCTION**

From the Gutenberg Press to the personal computer, the introduction of new technological means that facilitate the fixation and mass dissemination of expressive works is universally regarded as a boon to the advancement of learning, culture, and the progressive development of society. Enhanced fixation and mass dissemination capability generally render expressive works more widely available and affordable to the public at large. In the absence of such technological achievements, literature, art, and music are often luxuries exclusive to the wealthy elite, who can provide direct patronage to creators and thereby underwrite the production, fixation, private performance, and/or distribution of expressive material for their personal edification, entertainment, and indulgence. <sup>11</sup>

**[\*105]** The mere introduction of new technological means for fixing and mass-producing expressive works, however, does not guarantee improved public access to, or enjoyment of, such material. The cost of manufacturing, operating, and maintaining such technology, as well as the extent to which the law regulates its use or public access to the outputs therefrom, are some of the factors that determine whether these advances will inure to the benefit of society as a whole.

**Moreover, because creative artists typically lack the means or skills needed to utilize new expressive technologies, they generally grant to commercial distributors the rights to use such technologies to fix and distribute their work on their behalf. Unfortunately, in many creative industries, these practices have evolved into enduring traditions of creator exploitation, as well as the subordination of the public interest in the broad dissemination of expressive material.**

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<sup>1</sup> See Peter K. Yu, *Of Monks, Medieval Scribes, and Middlemen*, [2006 MICH. ST. L. REV. 1, 2-11 \(2006\)](#). See generally BRUCE W. BUGBEE, *GENESIS OF AMERICAN AND PATENT AND COPYRIGHT LAW* (Public Affairs Press 1967).

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The music recording industry provides a particularly egregious example. The rampant exploitation of creative artists in the music business --especially African American artists and artists from other marginalized communities--is widely known and increasingly condemned. Such exploitation, however, is neither necessary nor inevitable. This essay explores how creative artists can construct a new and socially responsive paradigm for the commercial distribution of music by: (1) embracing the opportunities for commercial and creative independence offered by **digital** information technology and (2) forming artist collectives to negotiate directly with **digital** platform music purveyors to distribute their work. By pursuing these and similar strategies, creative artists can ultimately emancipate themselves from decades of recording industry commercial feudalism.

*A. COPYRIGHT AS AN ENGINE TO PROMOTE THE PUBLIC ACCESS TO EXPRESSIVE WORKS*

**Copyright is the fundamental legal mechanism designed to encourage creators to embrace new technological applications for sharing their work with the public. Throughout modern history, various societies have adopted copyright legal regimes in order to both promote and regulate the use of new methods for fixing and distributing [\*106] expressive material.** <sup>22</sup> The extent to which copyright actually engenders the widespread and socially propitious integration of new applications for expressive works, however, depends upon the enunciated social utility goals of the law and the ways in which copyright protection is in fact implemented. <sup>33</sup>

Copyright can be structured and applied so as to maximize and harvest the social potential of expressive technologies. **Among other things, copyright can provide secular incentives and more to creators to use such technology to fix and disseminate their work, and thus increase the quantity and diversity of ideas and expression available to society.** At the same time, if construed or implemented with social indifference, copyright can instead inhibit social progress, free speech, and cultural development. When creator/distributor economic incentives and commodification objectives become paramount in the copyright system, public access to expressive works is socially impaired and the quality and diversity of the societal storehouse of expressive material is generally diminished. <sup>44</sup> Copyright property-right characteristics and concomitant commercial exploitation mechanisms must therefore be properly circumscribed and socially balanced through public access safeguards, such as fair use, to ensure that the social utility objectives of copyright are not compromised. <sup>55</sup>

**Indeed, even the copyright property-rights typically afforded to creators can be vitiated such that they tend to undermine, rather than benefit, creator interests. In theory, copyright provides certain rights to creators, in order to, among other things, enable them to dedicate their energies to creative endeavors and to improve creator prospects for deriving material benefit in the event that their work generates [\*107] commercial value. Creators typically use these rights to enter into collaborative enterprise with commercial distributors, who own or control fixation and dissemination technologies, such as publishing houses or record companies, with the hope of gaining wider public exposure and corollary financial returns.**

**Unfortunately, in many creator-distributor commercial collaborations, the distributor's pecuniary returns attain enterprise primacy, while the creators' interests and the rights of the public are subjugated.**

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<sup>2</sup> See Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, [44 SANTA CLARA L. REV. 365, 369-410 \(2004\)](#).

<sup>3</sup> See [U.S. CONST. art. I, § 8, cl. 8](#).

<sup>4</sup> See Stacy F. McDonald, Comment, *Copyright for Sale: How the Commodification of Intellectual Property Distorts the Social Bargain Implicit in the Copyright Clause*, [50 HOW. L.J. 541, 542-44 \(2007\)](#); Lateef **Mtima** & Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information*, [55 N.Y. L. SCH. L. REV. 77, 80-84 \(2010/11\)](#).

<sup>5</sup> Dallon, *supra* note 2, at 367-68; Shubha Ghosh, *Deprivatizing Copyright*, [54 CASE W. RES. L. REV. 387, 389 \(2003\)](#) ("The contemporary crisis in copyright centers on the question of whether copyright law serves to protect certain essential private property interests, or whether copyright law is informed by public, regulatory values.").

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**Consequently, whereas the commercial distribution of expressive works should serve copyright social utility, this commodification of expressive fixation and dissemination instead distorts the social symmetry of the creator-distributor collaboration. Creator remuneration and aesthetic control atrophies, while the public interest in the quality and diversity of expressive content is often all but completely ignored.** <sup>66</sup>

The modern music recording business provides one of the most important examples of this kind of distortion of copyright. <sup>77</sup> Under the prevailing industry contractual mechanisms and corollary accounting practices, creators are often surprised to discover that the licensing of their copyrights and interests nets them little to no monetary compensation. It will sometimes result in the creators' ultimate indebtedness to their record company distribution partner, even when the use of their work generated enormous revenues. <sup>88</sup> While some creators [**\*108**] do enjoy a beneficial slice from such revenues, it is typically the record company that retains the lion's share. <sup>99</sup>

**In short, notwithstanding copyright's explicit bestowal of property rights on behalf of music creators, when these rights are utilized to effectuate the commercial exploitation of musical works in the recording business, creators often receive little to no monetary benefit from these transactions. It is important to recognize, however, that this state of affairs is in no way mandated by the copyright schema. Instead, it is largely the result of an arcane business framework rooted in archaic music industry traditions, perpetuated by recording company oligopoly control and sustained through the general absence of artist bargaining power.** <sup>1010</sup> Creators yet to be discovered by the general public are forced to compete for access to the industry's

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<sup>6</sup> **Mtima** & Jamar, *supra* note 4, at 89-92. See, e.g., Joseph E. Stiglitz, *Economic Foundations of Intellectual Property Rights*, [57 DUKE L.J. 1693, 1701, 1716-19 \(2008\)](#) (discussing how economic-incentive approaches, which restrict IP access, can impede innovation).

<sup>7</sup> See generally Jeff Carter, *Strictly Business: A Historical Narrative and Commentary on Rock and Roll Business Practices*, [78 TENN. L. REV. 213 \(2010\)](#); Tuneen E. Chisolm, *Whose Song is That? Searching for Equity and Inspiration for Music Vocalists under the Copyright Act*, [19 YALE J. L. & TECH. 274, 305-20 \(2017\)](#).

<sup>8</sup> *Id.* at 219 ("Record company accounting practices and royalty computations are notorious for their complexity, perhaps purposefully so. The system is set up to ensure that the record company pays nothing to the artist unless and until the company has been reimbursed for each dollar expended on the artist; this includes: recording costs, all promotion and marketing expenses, and any advances received by the artist upon signing. These expenses are recoupable expenses, and it is standard industry knowledge that the artist does not get paid until he or she has 'recouped.' Under this system, any advance received by the artist is likely the only payment the artist ever receives from the record company...Unfortunately for most artists, the only true determination of whether the artist has legitimately recouped is accomplished through an independent audit of the record company's books. However, because independent audits often cost upward of forty to sixty thousand dollars, they are a cost-prohibitive resource for all but the most successful artists who actually stand to benefit should any discrepancies be discovered.").

<sup>9</sup> Chuck Philips, *Recording Stars Challenge Music Labels' Business Practices*, L.A. TIMES (Mar. 29, 2001), <http://articles.latimes.com/2001/mar/29/news/mn-44202>; Richard Salmon, *Recording Contracts Explained*, SOUND ON SOUND (Apr. 2007), <http://www.soundonsound.com/music-business/recording-contracts-explained>.

<sup>10</sup> Michael J. Perlstein, *Music Publishing*, in 2 COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 2015, 2-341, 2-354-72 (2015); Chisolm, *supra* note 7, at 321-22 ("The inequities that befall featured music vocalists are exacerbated and perhaps even perpetuated by the fact that, unlike performers in other areas of the performing arts, featured music vocalists have no union to negotiate minimum standards for contracts that control the predominant sources of their compensation and intellectual property interests. Bargaining power imbalances for beginning and non-superstar actors, directors, and television/film producers are countered by collective bargaining for standard contracts with minimum pay scales and even specified credits, which apply to all members of the Screen Actors Guild, the Producers Guild of America, and the Directors Guild of America... In the absence of a union that engages in collective bargaining related to recording agreements, recording artists are left to their own individual devices."). See also Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, [96 VA. L. REV. 549, 596-98 \(2010\)](#); Salmon, *supra* note 9.

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commercial fixation and distribution apparatus, and typically accept whatever terms the recording companies dictate.<sup>111</sup>

**[\*109]** Although these inequities have endured for decades, the situation is not immutable. Each generation of expressive technological advancement offers new possibilities for the socially productive commercial exploitation of creative works.<sup>1212</sup> Once the social utility potential of a particular technological development is recognized, new business paradigms can be developed to tap this potential and otherwise restore the copyright social balance.

**B. DEMOCRATIZING THE MUSIC BUSINESS: DIGITAL TECHNOLOGIES AND CREATOR COLLECTIVE BARGAINING**

This essay explores how, through the establishment of artist collectives, creators can collaborate with digital platform purveyors to revitalize the social utility function of copyright as it applies to the commercial distribution of music. It is common knowledge that the advent of digital information technology has thoroughly revolutionized the fixation and commercial distribution of music.<sup>1313</sup> Relatively inexpensive and widely available digital technology democratizes music fixation and mass distribution, providing creative artists with alternatives to record company "take it or leave it" deals.

Of course, the mere availability of digital options does not automatically transform artistic creators into able entrepreneurs or techno-adepts. Cooperative enterprise with digital distribution platforms to undertake the commercial distribution of music is the most prudent course. However, collaborative ventures with digital distribution partners need not devolve, as did the precedent analog business relationships. Digital platform business models are generally centered **[\*110]** around the comprehensive aggregation of content--the greater the quantity and diversity of the corpus, the better--somewhat the opposite of analog record company "artist and repertoire/cherry picking" traditions. Consequently, by organizing creator negotiation and licensing collectives, creators can not only improve their bargaining leverage, but they can assemble and offer content packages that are more compatible with the commercial strengths of the digital distribution business models and markets. Moreover, as the principal compilers of the distribution repertoire, creator collectives will also have a greater voice in shaping consumer inventories and thus reestablish a more symbiotic relationship with their public audience.

Working together, music creators and digital purveyors can restructure creator/distributor revenue allocation models while providing a wider variety of music content to the public. Thus, by more effectively mining the social potential of digital information technology, music creators can restore the music copyright social utility function.

**II. CREATORS, EXPRESSIVE TECHNOLOGIES, AND COPYRIGHT SOCIAL UTILITY (A BRIEF HISTORY)**

Prior to the introduction of technological means for fixing and mass distributing expressive works, the artist/audience relationship was typically binary in nature. Because fixation and mass distribution of creative works

<sup>11</sup> Carter, *supra* note 7, at 249 ("A major point of contention regarding the formation of recording industry contracts centers on the artist's perceived lack of bargaining power in negotiating with the record company. Without question, it is a 'take it or leave it' situation for almost every new or unproven recording artist. This is a simple matter of numbers, of supply and demand: singers, musicians, and songwriters stream into Los Angeles, New York, and Nashville by the thousands, hoping to fill a bare handful of available slots in an industry governed by elusive and ever-shifting standards and tastes. Because of this, the record companies and music publishers enjoy an unbelievable amount of bargaining power, typically offering the artists a standard boilerplate deal that heavily favors the company. Faced with no alternative and eager for a chance to succeed, many artists happily sign with record companies under unfavorable and onerous terms, entering into agreements that could be deemed unconscionable based on most artists' lack of any meaningful alternative.").

<sup>12</sup> Dallan, *supra* note 2, at 366-67.

<sup>13</sup> See, e.g., Luke Peters, *How Evolving Tech Has Changed Music Production*, TECH.CO (Jan. 25, 2016, 10:00 AM), <http://tech.co/music-production-evolution-2016-01>; Callie Taintor, *Chronology: Technology and the Music Industry*, PBS: FRONTLINE (May 27, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/music/inside/cron.html>.

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was arduous and costly, the author herself often served as the physical repository of her work. She personally recited and performed her creations for wealthy patrons, sometimes fixed her work in the available media formats (such as parchment), and produced such new material likely to satisfy the interests of her direct benefactors.<sup>1414</sup>

**[\*111]** Lacking mass markets, artists were generally dependent upon private patronage, as well as some limited government programs, for financial support.<sup>1515</sup>

By the mid-1500s, the invention of the printing press by Johannes Gutenberg in Germany both abetted and challenged the interests of literary creators. Literary works could now be easily and inexpensively fixed and mass distributed, allowing authors to reach wider audiences.<sup>1616</sup> At the same time, however, authors had less control over their work; once fixed by printing press technology, their work could be further reproduced and distributed without their authorization. In the absence of appropriate legal restraints, a literary creator might eventually lose all dominion over her work. For the mutual benefit of both authors and the public at large, some form of recognition of authors' literary property rights became necessary to encourage authors to take full advantage of the new technology, thereby increasing public access to their work.

Various societies adopted laws that recognized literary creator rights. One of the earliest of these systems was the Venetian system, adopted in Italy when the first Italian printing press operation was established in the late 1460s. This system involved the issuance of various "*privilegii*," granting authors certain rights or "privileges" in their works—an early predecessor to modern copyright.<sup>1717</sup> The **[\*112]** recognition and protection of authors' interests, however, was not a universal impetus for early European copyright systems. In France and the Netherlands, for example, the granting of exclusive rights to print works was more often a function of religious and political censorship or a means of promoting the printing and publishing trades.<sup>1818</sup>

<sup>14</sup> See Dallon, *supra* note 2, at 377-78 ("Technology has long driven development of copyright law. . . . In ancient times, writings were made on *clay* tablets, stone, metal plates, wood, papyrus, animal skins, and parchment. Suitable materials were often expensive and scarce, and writing on these materials could be difficult and time consuming. Transporting and preserving these writings could also be difficult. Under these conditions, the logistics of copying writings served as barriers to large scale copying and distribution of writings. The development of paper and improvements in ink made copying easier, but it was the invention of the printing press with moveable type that really prompted the development of copyright protection. The moveable type printing press facilitated efficient, mass duplication of a single manuscript . . . . With multiple copies and decreased costs associated with printing, literature became more accessible."); Yu, *supra* note 1, at 8 ("In the early Middle Ages, obtaining knowledge from books was not easy, and it often entailed 'weeks or months of negotiation with a distant house for its loan; the putting-up of a sizable pledge for its security; and the wait for its arrival.' Even after the manuscript was secured, it required several people and many months of labor to copy, proofread, decorate, and bind the book. Indeed, because of the limited access, 'any book, even badly produced and riddled with errors, might well be the only one on that subject that anyone in the community had ever seen.'"). See generally MICHAEL A. GOLLIN, *DRIVING INNOVATION: INTELLECTUAL PROPERTY STRATEGIES FOR A DYNAMIC WORLD* (Cambridge Univ. Press 2008).

<sup>15</sup> Yu, *supra* note 1, at 19. For example, in ancient Greece and Rome, prizes available through government sponsored literary and artistic competitions provided some incentive for creative endeavor. See *id.* at 5-6 & nn.15-19. *But cf.* Matthew Barblan, *Copyright as a Platform for Artistic and Creative Freedom*, [23 GEO. MASON L. REV. 793, 799 \(2016\)](#) ("Government or philanthropic patronage...leaves artists at the mercy of the government officials or donors who control the purse strings. . . . [R]elying on patronage threatens artistic independence by forcing artists to satisfy the preferences of a very small number of decisionmakers in order to secure support, rather than appealing to a broad variety of potential consumers.").

<sup>16</sup> Yu, *supra* note 1, at 10-11.

<sup>17</sup> Yu, *supra* note 1, at 15-18. Some of the printing privileges were patent or quasi-patent in nature, bestowing exclusive rights upon inventors and tradesmen to engage in the printing process or to print works in specific languages. Other privileges, however, were bestowed upon individual authors, granting them the exclusive right to print their works and punishing violators with fines. BUGBEE, *supra* note 1, at 45, 50-51.

<sup>18</sup> BUGBEE, *supra* note 1, at 48-49.

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In England, the evolution of modern copyright law would be influenced by all of these ideas. Initially, exclusive printing rights were bestowed principally upon book publishers as a means by which to lure foreign print tradesmen to England and to promote domestic printing entrepreneurship. By the middle of the sixteenth century, however, Queen Mary chartered the Stationers' Company, which all printers and publishers were required to join and through which the Crown exercised censorship of undesirable religious and political works. Although authors retained common law property interests in their works, they did not enjoy the right to *print* their works—a right that, under the Stationers' Company charter, belonged exclusively to its members. <sup>1919</sup>

For decades, English authors lobbied to obtain legal control over the printing of their works, which led to the eventual adoption of the Statute of Anne in 1710—the foundation for modern copyright law. <sup>2020</sup> **[\*113]** Entitled, "An Act for the Encouragement of Learning," the statute bestowed upon authors the exclusive right to print their works for limited periods. It also punished infringing acts with fines and seizure of unlawful copies. The title of the Act conveys the social utility function of the law—the bestowal of copyright protection as a means to encourage the use of expressive technology for the cultural enlightenment of society.

#### A. THE COMMODIFICATION OF COPYRIGHT SOCIAL UTILITY

Although authors could now control the printing of their works, most did not have the means or skills needed to establish or operate printing business concerns. Consequently, the authors continued to grant professional publishers the rights to print and distribute their work. Thus, the publisher/distributor relationship remained integral to the mass fixation and dissemination of literary works, and the modern creator/distributor/public commercial paradigm became enshrined. Through copyright, printing technology became socially integrated into the creator-to-audience linear exchange, inserting the commercial distributor as the conduit partner in the previously binary—and now tripartite—relationship.

On the other hand, for some publishers and other distributors of expressive content, their perspective toward the commercial distribution of expressive works was the same as that toward the production of any other Industrial Age commodity: decrease cost + increase efficiency of production = maximum commercial returns. The special social utility function of copyright in the political economy was not a factor in the commodification profit equation. In control of the commercial fixation and distribution apparatus, distributors had the power to unilaterally restructure the commercial dissemination process to more closely **[\*114]** resemble traditional "primacy to the owner of the means

<sup>19</sup> Dallon, *supra* note 2, at 389-91. English copyright's censorship heritage would continue to influence the evolution of the law well into the sixteenth century. In 1662, the Licensing Act was passed, which required that 'the Stationers' Company license all books before they could be printed. This refusal to grant authors control over their works, likely prompted by the Crown's censorship objectives, was pernicious to authors' commercial interests. Lacking control over the right to print their works, authors had to accept whatever terms publishers deigned to offer if they were to enjoy any commercial reward for their efforts. *Id.* at 396-402.

<sup>20</sup> *Id.* at 402-03, 409 ("[T]he Statute of Anne, the ancestor of American copyright law, had as its foremost objective the encouragement of learning—a general public interest—not the private economic interests of authors, printers, or publishers. It did have a secondary interest for the economic security of authors and other proprietors of books and writings, but this secondary concern was driven by the impact that the void of regulation had upon the creation of 'useful books.'"); Ghosh, *supra* note 5, at 429-30 ("Copyright's origins in British history are well-recorded and analyzed. The organization of publishing in the fifteenth century rested on a grant of a printing privilege by the crown, a privilege that had its origins in Venice. Owners of printing presses were given exclusive rights to publish certain materials deemed as having their source in the sovereign. Individual authors would also have their works published through private negotiation with a publisher. In England, the publishers and booksellers were organized in a guild called the Stationer's Company, which was established in 1557 by royal prerogative. Members of the Stationer's Company would negotiate with individual authors for the right to print the author's 'copy,' or manuscript. The term *copyright* was first used by the guild to indicate which publisher had the exclusive right to publish an individual author's work. Thus, copyright had its origins as a right of the publisher rather than a right of the author, and represented a private agreement among members of the guild . . . . The censorial use of the publishing system triggered a reaction from many authors of the time, particularly after the passage of the Licensing Act of 1662 that required a license to publish any work . . . . The Statute of Anne marked a victory for authors against publishers and censorship by the state.").



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of production" models. <sup>2121</sup> In addition to setting consumer prices, distributors could also unilaterally restructure creator/distributor revenue shares. Perhaps even more important, distributors could also pressure creators to concentrate on producing works of proven commercial viability. Of course, by dictating what creators produced, distributors also determined what kinds of works would be available for the public consumption. <sup>2222</sup>

In practical effect, the previously linear creator/distributor/public dissemination conduit would now be more accurately depicted as an isosceles triangle, with the distributor occupying the apex point from which it dictates business terms and market quality downward to the creator and public base points. As discussed in the next section, this distortion of copyright would ultimately prove pernicious to creator interests as well as to copyright social utility overall.

### III. THE COPYRIGHT COMMODIFICATION PARADIGM: EXPLOITATION OF ARTISTS AND MARGINALIZATION OF THE PUBLIC INTEREST

Although copyright bestows creators with legal rights in their works in part to encourage their socially productive use of expressive technologies, the commodification of the creator/distributor/public relationship undermines that objective. While this distortion of copyright is pervasive throughout the creative industries, the music industry provides a particularly stark example of this warping of copyright as a social ordering tool. Indeed, the inequitable exploitation of creative [\*115] artists in the music industry--particularly African American artists and artists from other marginalized communities--is the stuff of legend. <sup>2323</sup>

By all means, the traditions of unfair exploitation of creative artists in the music business are the result of various socio-economic and legal factors. <sup>2424</sup> Nonetheless, the misapplication of copyright is one of the key foundations

<sup>21</sup> See Ghosh, *supra* note 5, at 387-90 ("While patent law has for the most part lived up to [Constitutional] expectations, the history of copyright law has been a relative disappointment. Since the enactment of the first federal copyright act by Congress in 1790, the securing of the rights of an author for a limited time has not been guided by the invisible hand to the promotion of the public good. The history of copyright law in the United States has involved the perfection of copyright into a private property right, rather than a means to serve the public good. Since much cultural production occurs in corporate settings . . . the protection of authors as a means of enriching the public sphere with cultural creations has been transformed into the protection of business interests . . . . Somehow, the public good . . . emphasized in [the Constitution] has been lost, and copyright has turned into an unqualified private right.").

<sup>22</sup> See, e.g., Doris Estelle Long, "Democratizing" Globalization: Practicing the Policies of Cultural Inclusion, [10 CARDOZO J. INT'L & COMP. L. 217 \(2002\)](#). Long also comments that "[c]ulture and intellectual property appear to have gotten a divorce during the latter decades of the Twentieth Century." *Id.* at 217.

<sup>23</sup> See, e.g., Carter, *supra* note 7, at 214; Chisolm, *supra* note 7, at 330-33 (arguing for the recognition of an independent "vocalist's copyright" in sound recordings); K.J. Greene, "Copynorms," *Black Cultural Production, and the Debate Over African-American Reparations*, [25 CARDOZO ARTS & ENT. L.J. 1179 \(2008\)](#); Neela Kartha, *Digital Sampling and Copyright Law in the Social Context: No More Colorblindness!!* [14 U. MIAMI ENT. & SPORTS L. REV. 218 \(1997\)](#). See generally JACK HAMILTON, JUST AROUND MIDNIGHT: ROCK AND ROLL AND THE RACIAL IMAGINATION (Harvard Univ. Press 2016).

<sup>24</sup> See, e.g., Carter, *supra* note 7, at 228-29 ("Finally, and most importantly, was the nature of the [blues] artists' collective backgrounds. Almost without exception, the blues pioneers came from the hardscrabble existence known to millions of black sharecroppers during the first half of the twentieth century. Indeed, the grandfather of rock and roll and Chess' biggest star, Muddy Waters, literally stepped off a tractor in Stovall, Mississippi, packed a bag and his guitar, and caught a ride to Chicago to seek a better life. By 'better,' one must remember that music had yet to explode into a corporate industry accessible to an illiterate southern black man; thus 'better' meant anything that did not involve farming cotton twelve hours a day, six days a week, in ninety-eight degree weather. This was compounded by the sharecropper mentality peculiar to the blues pioneers, known as the 'furnish.' The furnish was a practice by which the white plantation owners literally furnished everything the black farmhand might need, such as food, clothing, housing, and equipment, in return for the farmhand's services in the cotton fields. Indeed, people in the industry view the relationship that existed between Muddy Waters and the Chess brothers as nothing more than another furnish, whereby in return for Waters' recordings, Chess saw to it that Waters had a new car in the drive, his bills

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upon which these traditions were established and through which they are sustained. Two prime examples of prevailing industry practices that deploy copyright more as a weapon against--as opposed to a tool in the service of--creator interests are the music publishing agreement and the sound recording deal.

**[\*116] A. THE MUSIC PUBLISHING AGREEMENT**

What is commonly referred to as "music publishing" is the practice in the trade whereby composers engage business entities and individuals to identify and consummate commercial licensing opportunities for their work. In essence, the music publisher functions as the composer's "booking agent." Music publishers seek out opportunities for composers' works to be recorded by recording artists and used in motion pictures, television programs, and the like. <sup>2525</sup>

Given that many artists are not especially adept at self-promotion and the vagaries of business negotiations and deals, it is not surprising that music publishers exist to provide these services. Some of the salient features of the typical music publisher/composer relationship, however, do not fit the general principal-agent paradigm. For example, under the standard music publishing agreement, the composer assigns her *entire copyright* to her publisher, in exchange for which the composer usually receives half of the revenues generated by the publisher's efforts. <sup>2626</sup> This is akin to the owner of Lassie hiring an agent to find the trained canine theatrical work, in exchange for which the agent receives full and exclusive ownership of Lassie, as well as half of her prospective earnings.

Moreover, whereas the standard music publishing agreement provides the publisher with exclusive control over the composer's work, the typical agreement does not actually *require* the publisher to secure licensing deals. <sup>2727</sup> Of course, given that the publisher is entitled to retain half of the revenues she generates, it is in her best interest to seek out such opportunities. At the same time, where a publisher's portfolio contains popular compositions written by renowned composers, along with unknown works composed by undiscovered artists, her energies may be better spent pursuing the ready markets for the "hot properties" she controls. Where the circumstances indicate that the publisher is not **[\*117]** actively marketing a composer's work, at best, the composer would likely have an implicit right to dissolve the relationship and, presumably, regain her copyrights. <sup>2828</sup>

Understandably, it would be unfair to dismiss the music publishing agreement as a wholly illusory and deceptive trade practice. Nonetheless, it does appear that, as a general matter, such agreements are grossly one-sided and inconsistent with the spirit of copyright protection.

**B. SOUND RECORDINGS**

Conceptually, a sound recording is really a derivative version of a music composition. As a practical matter, a sound recording is the product of three contributive elements: a musical composition, a performance of that composition, and the facilities used to record and produce additional copies of that performance. Given the collaborative nature of this endeavor, one might assume that all three contributors would have equal ownership of the copyright in the

paid in full, and food in his refrigerator. This was apparently the case with other independent labels as well; upon returning home from an extended tour, James Brown returned to find that King Records' Syd Nathan had purchased Brown a new Cadillac, a new suit, and a case of wine to enjoy during Brown's two-week holiday, only to charge the entirety of the cost for these items back to Brown's account as against Brown's sales royalties.").

<sup>25</sup> See Carter, *supra* note 7, at 222. See generally Michael J. Perlstein, *Music Publishing*, in 2 COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 2015, 2-341 (2015).

<sup>26</sup> See Carter, *supra* note 7, at 222; Perlstein, *supra* note 10 at 2-347-49.

<sup>27</sup> See Helienne Lindvall, *Behind the Music: When Artists are Held Hostage by Labels*, THE GUARDIAN (Apr. 15, 2010, 7:39 AM), <https://www.theguardian.com/music/musicblog/2010/apr/15/artists-held-hostage-labels>.

<sup>28</sup> See *id.*



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resulting work. If one were told that the common practice is for the copyright to belong to only one of these collaborators, many industry outsiders might guess that ownership would fall to the work's composer or to the artist who performs and records the work. Such guesses would be wrong, as the common practice--which is not dictated by copyright law--is that copyright ownership is ceded to the provider of the recording facilities: the record company distributor. For the composer's and performer's part in the sound recording collaboration, the two each receive a royalty, which is largely determined by the record company.<sup>2929</sup>

As for the amounts of the royalties that are actually paid by the record company, those are often a byzantine tale in itself:

Historically, record companies employed a complicated and tedious system of computing artist royalties that was based on pre-*digital* delivery systems such as vinyl albums and audiocassette tapes . . . . The old royalty computations were based largely on paying the artist as little of his or her royalties as possible. This was accomplished under the guise of the suggested retail list price, or SRLP. Here, the record company set a certain SRLP and then **[\*118]** automatically deducted a packaging charge from that price, usually amounting to twenty-five percent, an amount which was customarily far greater than the actual cost of packaging. The remaining seventy-five percent became the artist's royalty base, against which the artist applied their recoupment costs and other deductions to arrive at his or her share of the record's profit. However, the record company was not yet finished reducing the artist's earnings. In addition to the record's actual marketing and promotion budget, the record company added a fifteen-percent "free goods" deduction to the SRLP. Free goods included the records that were given--free of charge as promotional items--to retailers, radio programmers, and concert promoters. While this made a certain amount of sense in breaking an unproven act, the procedure was, and remains, applicable to every record ever released by the artist. Under the old free goods practice, if an artist sold 100,000 records at ten dollars per record, with a ten percent royalty rate, subject to a twenty-five percent royalty base reduction for packaging and a fifteen percent reduction of records actually sold under the free goods practice, the artist could expect to earn only \$ 63,750.00 in pre-tax dollars. Adding further insult to the artists' injury was the record companies' age-old practice of paying the artist on only ninety percent of net sales in order to account for "breakage." Because records were once made of shellac and were thus breakable, the record companies retained ten percent to cover this expense, a practice which persisted into the modern era when records were no longer breakable.<sup>3030</sup>

The practices regarding music publishing and record deals are not immutable. The devaluation of artist interests is not only socially unjust, it contravenes important social objectives of copyright. As discussed in the next section, however, theories of copyright social justice can restore the copyright social utility function to the commercial distribution of music.

**[\*119]** IV. MOVING TOWARD COPYRIGHT SOCIAL JUSTICE: RESTORING THE ARTIST/AUDIENCE SYMBIOSIS

American copyright law departs from the natural law underpinnings of its English forebears, yet the United States Constitution embraces the English concept of promoting copyright social utility through the recognition of authors' literary property rights.<sup>3131</sup> Further, American copyright law is grounded in a positive law charge of promoting

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<sup>29</sup> See, e.g., Lindvall, *supra* note 27; Salmon, *supra* note 9.

<sup>30</sup> Carter, *supra* note 7, at 219-20. Of course, famous artists are sometimes able to negotiate better deals and even renegotiate the bad ones. But these situations are the exceptions to the rule. *Id.* at 221.

<sup>31</sup> See Alan L. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 WM. & MARY L. REV. 569, 571 (2002); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953, 971-73 (2007). See generally, Steven D. Jamar, *Symposium: The Global Impact and Implementation of Human Rights Norm: A Social Justice Perspective on the Role of Copyright in Realizing International Human Rights*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 289 (2012). Presumably, the distortion of copyright that undermines

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literary and artistic endeavor toward the advancement of American culture and the greater societal good.<sup>3232</sup> The property rights afforded to authors under the Constitution is a subordinate means toward the achievement of the law's overarching social utility ends.<sup>3333</sup>

**[\*120] Intellectual property law as applied, however, does not always fully effectuate these objectives and may sometimes even frustrate these goals. In many circumstances, intellectual property protection actually serves as a barrier to access to information and education, as well as to health and medicines.<sup>3434</sup> In other situations, the rules of intellectual property protection are systemically misused toward socially counter-productive ends. Marginalized groups in the developed world, as well as communities in many developing nations, perennially suffer from the misappropriation and inequitable exploitation of their indigenous knowledge and cultural expression. This is often at the hands of established intellectual property stakeholders, who in turn insist upon the utmost respect and protection for their own rights and interests.**

<sup>3535</sup> The **[\*121]** failure of the intellectual property regime to address such abuses not only discourages intellectual

creator interests would seem abhorrent to intellectual property regimes rooted in natural law. Moreover, positive intellectual property social justice theories are compatible with natural law systems regimes. See, e.g., International Covenant on Economic, Social and Cultural Rights, Article 15(1); Jorn Sonderholm, *Ethical Issues Surrounding Intellectual Property Rights*, in *NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY* 110, 117 (Annabelle Lever ed., Cambridge Univ. Press 2012) ("The natural right of appropriation central to libertarianism has an important proviso . . . which is an 'enough and as good' clause on original appropriation . . . . Where resources are scarce, one cannot legitimately stake a claim to something by annexing one's labour to it . . . . If the resource is necessary for the continued well-being of others, then the fact that x was the one who developed or improved the resource does not give x exclusive rights over it. x's entitlement to reward for her labour is overridden by the entitlement of others to that which is necessary for their survival."); Jamar, *supra* at 296-97.

<sup>32</sup> See Paul Belleflamme & Martin Peitz, *Digital Piracy: Theory*, in *OXFORD HANDBOOK OF THE DIGITAL ECONOMY* 489, 490-91 (Martin Peitz & Joel Waldfogel eds., Oxford Univ. Press 2012); Jane C. Ginsburg, *International Copyright: From a "Bundle" of National Copyright Law to a Supranational Code?*, 47 *J. COPYRIGHT SOC'Y U.S.A.* 265, 265-67 (2000).

<sup>33</sup> See [Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 \(1985\)](#) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'") (quoting [Mazer v. Stein, 347 U.S. 201, 209 \(1954\)](#)); Ghosh, *supra* note 5, at 392-93; Lateef *Mtima*, *Copyright and Social Justice in the Digital Information Society: "Three Steps" Toward Intellectual Property Social Justice*, [53 HOUS. L. REV. 459, 480 \(2015\)](#).

<sup>34</sup> See, e.g., Steven D. Jamar & Lateef *Mtima*, *A Social Justice Perspective on Intellectual Property, Innovation, and Entrepreneurship*, in *ENTREPRENEURSHIP AND INNOVATION IN EVOLVING ECONOMIES: THE ROLE OF LAW* 78 (Megan M. Carpenter ed., Edward Elgar 2012); Ann McGeehan, *Worth More Dead Than Alive: Join the NoCopyright Party and Start Killing Copyrights For Their Own Good*, in *INTELLECTUAL PROPERTY, ENTREPRENEURSHIP AND SOCIAL JUSTICE: FROM SWORDS TO PLOUGHSHARES* 191 (Lateef *Mtima* ed., Edward Elgar 2015).

<sup>35</sup> See Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 *U.C.DAVIS L. REV.* 717, 773-74 (2007) ("The first multilateralism, from the 1500s to 1945, suggests that, even prior to the end of the nineteenth century, many territories in Africa, Asia, and the Pacific were already subject to IP conventions and regulations implemented through formal and informal European control. . . . These arrangements unsurprisingly had a European flavor, due in no small part to a self-perceived superiority and attendant 'responsibility' to 'civilize' the non-Europeans. The consolidation of formal colonial rule in which IP laws were an integral part soon followed. IP laws were extended to colonies during this period, in part to advance colonial strategies of assimilation, incorporation, and control. . . . [T]he second multilateralism, from 1945 to the 1990s, accompanied the demise of colonialism and attendant debates as to the appropriate role for developing countries in the international IP system. New sovereign states were first recognized, and then conditions were constructed for their participation in international fora without interrogation into the appropriateness or value of IP laws in their respective domestic settings. The result was a legitimization of developing countries' adherence to colonial-era legislation under the guise of an international legal system wholly unrelated to domestic priorities and constraints. Meanwhile, treaties used for the effective subjugation of non-Europeans in the colonial period continued to be the formal tool of choice to facilitate the developed countries' strategic exercise of power."); Cynthia M. Ho, *Biopiracy and Beyond: A Consideration of Socio-Cultural Conflicts with Global Patent Policies*, [39 U.MICH. J. L. REFORM 433, 435-36 \(2006\)](#). See also Lateef *Mtima*,

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property development and dissemination by exploited groups and communities, it can also foster antagonism and disrespect toward intellectual property protection on a fundamental level.<sup>3636</sup>

Where the application and enforcement of intellectual property law does not encompass redress for pertinent social injustice, the result can be impairment of the law's overarching social utility objectives. Evaluating problems of intellectual property social injustice for its impact on intellectual property social utility acknowledges that certain social deficiencies gnaw at the very foundations of intellectual property protection.<sup>3737</sup> In such cases, it is more than doctrinally appropriate to re **[\*122]** examine intellectual property law as a tool for social justice. It is doctrinally imperative that the law be interpreted and applied to correct these social inequities in deference to the social ordering goals of intellectual property protection.<sup>3838</sup>

*What's Mine is Mine But What's Yours Is Ours: IP Imperialism, the Right of Publicity, and Intellectual Property Social Justice in the Digital Information Age*, [15 SMUSCI. & TECH. L. REV. 323, 332-36 \(2012\)](#); Stephen R. Munzer, *Corrective Justice and Intellectual Property Rights in Traditional Knowledge*, in *NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY* 58 (Annabelle Lever ed., Cambridge Univ. Press 2012).

<sup>36</sup> See Susan Tiefenbrun, *A Hermeneutic Methodology and How Pirates Read and Misread the Berne Convention*, [17 WIS. INT'L L.J. 1, 1 \(1999\)](#) ("Economics alone cannot explain why a country chooses to steal books, cassettes, movies, and computer programs rather than obey the law. The causes and effects of intellectual property piracy are intricately connected to, and affected by, a multiplicity of factors including the economy of the country in which the piracy is committed, the political history and ideology of the pirating nation, the culture of the people engaged in the piracy, and the adequacy of the legal system to enforce domestic and international intellectual property laws."). See also Christine Haight Farley, *Registering Offense: The Prohibition of Slurs as Trademarks*, in *DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS*, 105, 110-12 (Irene Calboli & Srividhya Ragavan eds., Cambridge Univ. Press 2015) ("Recent psychological evidence has demonstrated the negative effects associated with stereotypical and derogatory references to Native American people. . . . Besides this psychological harm, an additional and more symbolic harm occurs when someone's cultural identity is literally, and legally, owned by another entity . . . . By trademarking a racial referent, the message is that the referent is owned, and the owner has the legal right to use the racial term; perhaps even the obligation to use it. . . . And by going into business under harmful words, the owner also causes others--fans and consumers--to endlessly utter them."); JOHANNA GIBSON, *CREATING SELVES: INTELLECTUAL PROPERTY AND THE NARRATION OF CULTURE* 4-6 (2006).

<sup>37</sup> The body of work that explores and delineates the social justice obligations of intellectual property law has become extensive and continues to develop. See, e.g., Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, [40 U.C. DAVIS L. REV. 717 \(2007\)](#); Anupam Chander & Madhavi Sunder, *Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice*, [40 U.C. DAVIS L. REV. 563 \(2007\)](#); Margaret Chon, *Intellectual Property and the Development Divide*, [27 CARDOZO L. REV. 2821 \(2006\)](#); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, [40 U.C. DAVIS L. REV. 1151 \(2007\)](#); Brianna Dahlberg, *The Orphan Works Problem: Preserving Access to the Cultural History of Disadvantaged Groups*, 20 S. CAL. REV. L. & SOC. JUST. 275 (2011); Rita Heimes, *Trademarks, Identity, and Justice*, [11 J. MARSHALL REV. INTELL. PROP. L. 133 \(2011\)](#); Peter S. Menell, *Property, Intellectual Property, and Social Justice: Mapping the Next Frontier*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 147 (2016); Lateef **Mtima**, *Copyright and Social Justice in the Digital Information Society: "Three Steps" Toward Intellectual Property Social Justice*, [53 HOUS. L. REV. 459 \(2015\)](#); Lateef **Mtima**, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, [112 W. VA. L. REV. 97 \(2009\)](#); Lateef **Mtima** & Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information*, [55 N.Y. L. SCH. L. REV. 77 \(2010/11\)](#); Lateef **Mtima**, *Introduction, Symposium on Intellectual Property and Social Justice*, [48 HOW. L.J. 571 \(2005\)](#).

<sup>38</sup> I have argued elsewhere that in this sense, the pursuit of social justice is an inherent obligation of intellectual property protection. See Lateef **Mtima**, *From Swords to Ploughshares: Towards a Unified Theory of Social Justice*, in *INTELLECTUAL PROPERTY, ENTREPRENEURSHIP AND SOCIAL JUSTICE: FROM SWORDS TO PLOUGHSHARES* 265, 269-70 (Lateef **Mtima** ed., Edward Elgar 2015) ("Intellectual property social justice . . . [is based on a] core premise . . . that the principles of equitable access, inclusion, and empowerment are *intrinsic* to intellectual property protection as a social ordering mechanism. A particular benefit of this approach is that the instances in which intellectual property protection is permitted to obstruct critical social welfare imperatives are not addressed as independent IP social maladies, but rather as symptoms of an IP systemic malaise, engendered and perpetuated by a misconstruction of and consequential imbalance in the intellectual property regime. Intellectual property social justice therefore prioritizes holistic revitalization of the intellectual property infrastructure over

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**[\*123]** A. RESTORING INTELLECTUAL PROPERTY SOCIAL JUSTICE TO THE MUSIC INDUSTRY: ARTIST EMPOWERMENT THROUGH **DIGITAL** APPLICATIONS AND MARKETS

While economic theories of copyright law contemplate creators' legal rights as pecuniary incentives to create,<sup>3939</sup> the truth is that creators have been engaged in expressive endeavors long before the invention of the Gutenberg Press and the concomitant development of copyright protection.<sup>4040</sup> It seems more accurate to consider copyright as the societal means by which to encourage creators to make use of expressive technologies to fix and share their work with wider audiences, and thereby promote the education and cultural development of the public.

As discussed above, however, the pervasive commodification of the creator/distributor/public relationship throughout the creative industries has resulted in manifold conditions of social injustice. This social injustice tends to impede the law's overarching social goals. Due to the recording company's exploitative mass fixation and distribution apparatus, the distorted copyright function systemically deprives artists of the financial benefits that are intended to encourage and reward artists' use of expressive technology toward the greater societal good. Consequently, many creators lack the resources to sustain their artistic endeavors, or worse—die impoverished, never able to realize their full creative potential. Other artists are denied altogether any access to the mass fixation and distribution infrastructure, having been assessed as lacking sufficient commercial viability to warrant investment in their creative output.<sup>4141</sup> While potential profit and loss are valid considerations of any commercial enterprise, commodification absolutes are often inapt to the role of creative discourse in the advancement of culture and can **[\*124]** undermine the public interest in broad access to a diverse menu of artistic expression.

Just as the introduction of the Gutenberg Press midwived copyright, **digital** information technology offers concrete opportunities to rehabilitate the role of copyright in the commercial distribution of music.<sup>4242</sup> In the "Analog Age," recording companies provided creators with two essential commercialization components: recording facilities and a mass distribution apparatus. Today, **digital** technology alternatives can satisfy each of these functions; creators no longer need to surrender their copyrights in inequitable and adhesive record deals.

The availability of **digital** applications has already democratized music fixation and public dissemination.<sup>4343</sup> Many amateur and professional artists now digitally compose and record their work in the privacy of their own homes,

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localized responses to its symptomatic ills. In this sense, intellectual property social justice is perhaps more aptly described as a theory of IP social *restoration*, as opposed to IP social *reform*."). See also Chisolm, *supra* note 7, at 320-29; Margaret Chon, *Global Intellectual Property Governance (Under Construction)*, [12 THEORETICAL INQ. L. 349, 358 \(2011\)](#) ("Even if promoting creation and innovation is the premier value of intellectual property, the rights-maximizing agenda pursued by intellectual property-exporting states has resulted not only in power asymmetry but arguably in policies that are not welfare-maximizing even for domestic industries within those states. Access for the purpose of follow-on innovation—in other words, for maximizing returns on the public good of knowledge itself—is a critical policy component within the overall intellectual property regulatory framework. Moreover, access to knowledge for purposes of maximizing other global public goods such as basic education, food security and disease control implicates both fairness and growth.").

<sup>39</sup> See, e.g., Justin Hughes, *The Philosophy of Intellectual Property*, [77 GEO. L.J. 287, 291, 299 \(1988\)](#); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

<sup>40</sup> See, e.g., Daniel J. Gervais, *Intellectual Property and Human Rights: Learning to Live Together*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 14 (Paul Torremans ed., Kluwer L. Int'l 2008) ("[N]ow that intellectual property has entered the house of trade law, it may not be possible to [dethrone economic analysis]. Yet, in the very spirit of law & economics, it may be useful to question the *monopoly* of economic analysis on the theoretical discourse surrounding the foundations and evolution of copyright policy.").

<sup>41</sup> See, e.g., Lindvall, *supra* note 27.

<sup>42</sup> RETHINK MUSIC, FAIR MUSIC: TRANSPARENCY AND PAYMENT FLOWS IN THE MUSIC INDUSTRY (2015) [hereinafter: RETHINK MUSIC].

<sup>43</sup> *Id.*



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often inexpensively and with results that are of "studio quality." Consequently, ***digital*** information technology offers a revolutionary opportunity for constructing a new and progressive music fixation/distribution paradigm: by utilizing ***digital*** recording technology, creators can record (and thereby own the master copies of) their works, *such that the creators, not the record companies, will own the copyrights in their sound recordings.*

***Digital*** recording applications have also opened doors for composers who are not literate in written music notation and are unable to prepare written scores of their compositions. Such composers now have more and better options to "score" direct to a ***digital*** recording and thus control the copyright registration of their creations, making them less vulnerable to corporate piracy.<sup>4444</sup> ***Digital*** applications also offer creators greater artistic control and independence, enabling them to improvise, revise, and decide when their work is ready for public unveiling, all without corporate pressure. These benefits to creative endeavor and output are available without reliance upon the financial [\*125] and/or technical resources (and the attendant commodification restrictions) of a major record label.

Perhaps even more germane to copyright's social function, ***digital*** innovations have provided artists with unheralded opportunities to share their work directly with the public. Thanks to social media platforms such as YouTube, artists no longer need curry for corporate approval to have their work released to the public.<sup>4545</sup> ***Digital*** distribution venues allow artists to disseminate their work and obtain the direct and immediate reaction that most artists crave, while regaining a direct and more symbiotic relationship with their audience. Through social media, artists can build their individual brands and develop a following, thereby establishing commercial viability and increasing their bargaining leverage with future commercial distributors.

On a broader scale, creators can use ***digital*** applications to construct and implement a new and more equitable paradigm for the institutional commercial exploitation of their works.<sup>4646</sup> Rather than accept and implement ***digital*** information technology, record companies clung to their excessively self-indulgent and exploitative business models, built and sustained at the artist's expense.<sup>4747</sup> Artists can now eschew record company distribution and collaborate directly with ***digital*** platforms, which have a proven history of pioneering new business models for music distribution. A prime example is shown by the wellknown story of Apple and the creation of iTunes. iTunes met the public demand for the new formats and a new delivery system, breaking through years of the record company's stubborn (and oligopolistic) refusal to accept such formats and ***digital*** technology.

Moreover, ***digital*** platforms are inherently compatible with certain creator needs. ***Digital*** platform business models are generally centered around the comprehensive aggregation of content--the greater the quantity and diversity of the corpus, the better--somewhat the opposite of analog recording company "artist and repertoire/cherry picking" traditions. This can be especially beneficial to the unknown artist. Unlike analog systems, wherein consumers could not afford to purchase or store large music libraries, ***digital*** files and cloud archives alleviate those [\*126] concerns. Through advertising models and subscriptions fees, consumers can maintain access to vast music libraries, constantly replenished with new material.

Of course, the lynchpin to creator-driven music distribution is the ability to engage in "bulk licensing" and deliver a large and diverse community of artists and their works. This can be best accomplished by establishing entities that represent and negotiate collectively on the artists' behalf.

#### B. ARTIST COLLECTIVE REPRESENTATION AND BARGAINING

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<sup>44</sup> See Brief Amicus Curiae of the Institute for Intellectual Property and Social Justice et al. in [Support of Appellees at 5-6, Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK \(AGRx\), 2014 WL 7877773](#) (C.D. Cal. Oct. 30, 2014), appeal filed (9th Cir. Aug. 23, 2016).

<sup>45</sup> See, e.g., Music, YOUTUBE, <https://www.youtube.com/channel/UC-9-kyTW8ZkZNDHQJ6FgpwQ> (last visited May 29, 2017).

<sup>46</sup> RETHINKMUSIC, *supra* note 42.

<sup>47</sup> See, e.g., Carter, *supra* note 7, at 244-46.



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Once a creator has recorded her work in a *digital* format, it becomes amenable to commercial distribution through *digital* music platforms.<sup>4848</sup> Artist collectives can provide a useful mechanism through which to negotiate and collaborate with *digital* platforms to undertake this kind of business enterprise.

To establish a viable artist collective, the organizers must first be able to recruit a wide variety of artists. Participation in a music distribution collective would likely be attractive to most unknown artists, and it may also be attractive to established artists who are no longer committed to a record label or who have exercised their copyright termination rights and regained control of their works.<sup>4949</sup> Moreover, just as unknown artists will benefit from the drawing power of established artists, established artists will in turn benefit from exposure to the new audiences that up-and-coming artists can attract. Participation in a music distribution collective could also provide many indirect benefits, such as opportunities to meet and work with other collective members, fostering the kind of informal mentoring and "jam session" creative environments which helped to pioneer jazz, rock and roll, and many other music genres.

Whereas artist recruitment could initially prove challenging, it may later become necessary to establish standards and criteria for artist participation in a licensing collective. Among other things, threshold [\*127] participation standards could indirectly affect the total compensation that participants receive. For example, in addition to distributing an artist's music for sale, *digital* music platforms also offer users the opportunity to listen to music. These "music listening" services are typically monetized through subscription fees and ad revenues.<sup>5050</sup> When the work of a popular artist is included in such a service, it brings additional value to the corpus as a whole (i.e., increased user interest). Accordingly, that artist is entitled to additional compensation, separate and apart from the compensation due from the revenues derived from actual sales of her work. Consequently, if every artist willing to participate in the licensing collective were accepted on the same basis, the size of the per-participant total revenue share would likely be reduced.

One possible approach might be to bifurcate "amateur" level participation in the collective. Given that many unknown artists will be eager to participate, "general amateur" admission could be based on a combination of satisfaction of minimum technical recording standards (to ensure the overall technological quality of the corpus and compatibility with commercial distribution platforms), together with evidence of regional notoriety and/or social media recognition. However, "general amateur" status would not include participation in the general corpus (i.e. listening as opposed to sales) revenues, given that a "general amateur's" ability to attract an audience (and generate subscription fees or ad revenue) is likely minimal.

On the other hand, "advanced amateurs" and other artists who join the collective with a proven fan base (or once they develop same) would be eligible to share in those revenues, as well as in the revenues from the sales of their works. Further, participation in general corpus revenue could be on a graduated scale, with the lowest rate applied to artists with [\*128] only a limited following, and higher rates paid to famous artists who draw many users to the corpus.<sup>5151</sup>

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<sup>48</sup> *Digital* information technology offers an important opportunity for constructing a new and progressive music fixation paradigm. With the ability to digitally record and distribute their work, creators will own the master copies of their works, and can even elect to share that ownership with recording artists when appropriate.

<sup>49</sup> See **17 U.S.C. § 203** (2002) (This statute provides for termination of transfers and licenses granted by the copyright holder.).

<sup>50</sup> See, e.g., Barblan, *supra* note 15, at 807-08 ("Channel partners . . . play a key role in delivering art to consumers. The *digital* age has brought a wealth of new formats and platforms that consumers can use to access artistic works. In addition to traditional formats, customers can stream movies and music on a wide range of devices through dozens of services . . . . For music, consumers can choose between *digital* radio and *digital* interactive ad-supported or subscription services as well as several purchase license options."); SoundCloud, SOUND CLOUD, <https://www.soundcloud.com> (last visited Aug. 17, 2017); Spotify, SPOTIFY, <https://www.spotify.com/us/> (last visited Aug. 17, 2017).

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For each artist, the collective would negotiate for the right to license the distribution of either a specific catalogue of an artist's work or the artist's total output during a specified period. In the latter case, the collective might obtain a right of first refusal to distribute, particularly with respect to the output of "general amateur" participants. In many traditional record company deals, material deemed "uncommercial" is not released, often notwithstanding the artist's objection. In contrast, under a right of first refusal model, if the artist collective is not interested in distributing certain material, the artist would be free to shop it elsewhere or to self-distribute.

The key to the artist collective's success will be its ability to deliver a large and diverse body of music content. The artist collective can also provide several advantages over the traditional record company artist recording contract and distribution model. One such advantage would be the collective's ability to identify and recruit new artists, saving the *digital* distributor the analog "artist and repertoire" expense of artist development.<sup>5252</sup> Another benefit would be that, as the principal compiler of the distribution corpus, the artist collective will have a more prominent role in shaping consumer music inventories, beneficially impacting the creator/audience symbiotic relationship. Between artist-centered recruitment and *digital* capabilities to store vast amounts of content, *digital* music platforms, by dealing directly with artist collectives, could offer a wide range of music genres to the public, as well as a variety of user listening, sharing, and purchasing services.

Finally, there may be additional copyright social utility benefits that artist collectives could provide. For example, artist collectives can develop and promote "best practices" for unauthorized *digital* use of copyrighted music, including use in user-generated works, to complement user rights doctrines such as fair use. When reasonable [\*129] principles for content use are promulgated by artist communities--who often encourage non-commercial use of their material--the public is more likely to respect such guidelines.

## V. CONCLUSION

Archaic and adhesive music industry practices, reinforced by the general absence of creator bargaining power, have perpetuated traditions of copyright distortion and inequity. In turn, this deprives creators of fair returns from the commercial distribution of their work. Moreover, this commodification of copyright vitiates the inherently symbiotic relationship between creators and the public, often pitting artists against the audience to further commodification objectives at the expense of copyright social utility and justice. By exploiting the social potential of *digital* information technology in concert with collective organizing, creators can restore copyright to its proper function in promoting the dissemination of music toward the greater societal good.

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<sup>51</sup> Of course, all participants would be entitled to royalties from the actual sales of their works. While it can sometimes be difficult to determine the extent to which a particular artist is attracting listeners to a music platform (just the same as with traditional radio), when consumers purchase specific music it's obvious which artists have generated that revenue.

<sup>52</sup> See, e.g., Heather McDonald, *Learn What A&R Is in the Music Business*, THE BALANCE, (July 10, 2017), <https://www.thebalance.com/what-is-aandr-artist-and-repertoire-2460349>.